



POLICE DEPARTMENT

November 13, 2009

MEMORANDUM FOR: Police Commissioner

Re: Detective Edgar Bayas
Tax Registry No. 921142
7 Precinct
Disciplinary Case No. 84888/09

The above-named member of the Department appeared before me on October 7, 2009, charged with the following:

1. Said Detective Edgar Bayas, while on duty and assigned to Narcotics Borough Brooklyn South, on or about August 3, 2007, at approximately 0150 hours, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said detective, after making an arrest of an individual, identity known to the Department, did fail to ensure that said prisoner's property, a bicycle, was safeguarded when the detective allowed said bicycle to be left unattended on the street while the prisoner was taken into custody and transported to the command, resulting in the bicycle's theft from the street.

P.G. 203-10 Page 1, Paragraph 5 – PUBLIC CONTACT PROHIBITED
CONDUCT- GENERAL REGULATIONS

The Department was represented by Michelle Alleyne, Esq., Department Advocate's Office, and Respondent was represented by Peter Brill, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

COURTESY • PROFESSIONALISM • RESPECT

DECISION

The Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant John Bianco.

Sergeant John Bianco

Bianco had been a member of the Department for nearly twenty years. He was assigned to the Investigations Unit of the Organized Crime Control Bureau. He investigated an allegation of lost prisoner property during the course of a Brooklyn South Narcotics (BSND) buy-and-bust operation done on August 3, 2007. The prisoner's name was Gabriel Petrella. Captain Pascal of BSND was interviewing Petrella about a separate investigation when Petrella relayed to Pascal that his bicycle was missing.

Bianco testified that he interviewed all the members of the relevant field team. He learned that the member who apprehended Petrella was Detective Manuel Fernandez. Bianco interviewed Fernandez, who stated that he was assigned to a "chase car" with the Respondent and Detective Edwin Stuart. Bianco testified that the tactical, or "tac," plan, for that day's operations, showed the Respondent, Fernandez and Stuart in one car.

Fernandez told Bianco that he received a radio transmission from the field team that a male white riding a bicycle had sold narcotics to an undercover officer. Fernandez observed the male, Petrella, on the bicycle at the corner of East 17th Street and Cortelyou Road. Fernandez got out of the car as the male rode toward him. Fernandez grabbed onto the male's t-shirt, and

there was a brief struggle before Fernandez knocked him off the bicycle and arrested him. The bicycle was on the sidewalk in front of a house. He did not need assistance in handcuffing Petrella.

Bianco testified that Fernandez told him the “field team was present” when Petrella was handcuffed. Fernandez admitted that he did not secure the bicycle. He did not know if any other member of the field team, including the chase car, secured the bicycle. Bianco testified that in the course of his investigation, he found no paperwork indicating that a bicycle was vouchered or otherwise secured.¹

Summary of First Official Department Interview of Respondent

Fernandez was interviewed by Bianco on September 24, 2008 (see Department Exhibit [DX] 1, recording; DX 1a, transcript):

Fernandez agreed that he was working on August 3, 2007, in BSND. He was shown the tac plan for that day’s operations, and stated that he was assigned to work with the Respondent and Detective Stuart. He was not the driver. According to the tac plan, they were conducting undercover operations, and Detective Hunter was designated the arresting officer.

Bianco showed Fernandez a photograph. He recognized it as the male he stopped but did not remember his name. Bianco told him the male’s name was Gabriel Petrella. Upon being shown the arrest report, Fernandez stated that Petrella was arrested at the northeast corner of Cortelyou Road and East 17th Street.

¹ The Advocate stated that Fernandez, in conjunction with another case, pleaded Guilty on July 30, 2009, to charges and specifications in exchange for a recommended penalty of 69 days already served on suspension and one year dismissal probation. The charges, in addition to failure to safeguard prisoner property, were impeding an investigation and failure to report misconduct (see Case Nos. 83718/08 & 84849/09, pending at Police Commissioner). The supervisor, Arenella, was terminated after a criminal conviction not directly related to this matter. Stuart received a command discipline, which, the Advocate stated, was also offered to the Respondent.

Fernandez stated that he was present when Petrella was stopped. The reason Fernandez or "your team" stopped him was that he had sold to one of the undercover officers. It was put over the point-to-point radios that Petrella took off on a bicycle, and "much later, I stopped him on a bike." Fernandez stated that he was the first person to stop Petrella. He grabbed Petrella's shirt and there was a struggle. Both tumbled off the bicycle. They were on the sidewalk in front of someone's lawn.

Fernandez placed the handcuffs on Petrella. He did not recall if the stop happened at the same location as the documented place of arrest, but stated that he did not move Petrella after stopping him.

Fernandez stated that once he was handcuffing Petrella on the ground, "[t]he team was pretty much there. . . . Everybody was pretty much there," including the prisoner van. Fernandez confirmed that he grabbed Petrella before the prisoner van arrived. The van was "jumping out when" Fernandez "was picking him up."

Fernandez walked Petrella to the back of the prisoner van. The bicycle was still present. After placing Petrella in the van, Fernandez went to wash up, when someone said "we've got to go" because the undercover officers were setting up for another buy. Fernandez admitted that he did not secure the bicycle; he "took off to set up in another location." He did not know if Hunter, the arresting officer, secured the bicycle. Their supervisor, Sergeant Arenella, was on scene but Fernandez did not know if he secured it. Fernandez did not see anyone place the bicycle into the prisoner van, an RV or an RMP.

On cross-examination, Bianco stated that Petrella had originally complained that he was also missing a watch. Petrella later stated that he accounted for his watch. Additionally, Petrella gave a false name when he was arrested. Petrella stated that the bicycle was valued at \$1,800.²

Bianco testified that all “[e]verybody on the field team,” including Arenella, Hunter, the ghosting team and the undercover, “says that the person who sold drugs rode away on a bicycle.” No one other than Fernandez, however, remembered seeing the bicycle at the scene. Bianco testified that Arenella told him he arrived on the scene after Petrella was arrested.

Bianco agreed that during an operation, individual members do not “always maintain the same positions” as are listed on the tac plan.

Bianco conceded that because “the arresting officer should account for all property,” it is ultimately that officer’s responsibility to voucher the bicycle. On re-direct examination, however, Bianco stated, “Any officer who stops or places somebody under arrest whether he is going to ultimately be the arresting officer or not is responsible for any property that they come into contact with.”

The Respondent’s Case

The Respondent testified on his own behalf.

The Respondent

The Respondent testified that he had been a member of the Department for about twelve years and a detective for a little over seven. He had worked as an undercover officer. In the beginning of August 2007 he was transferred to Brooklyn South Narcotics. The incident in

² An investigative worksheet of Sergeant Edwin Gutierrez (see Court Exhibit [CX] 1), dated March 21, 2008, stated that he was informed by Petrella that Petrella had a receipt for the bicycle.

question happened within the first few days of his transfer. He was unfamiliar with the geographical layout of Brooklyn South. In terms of BSND's procedures, the Respondent stated, "I was new in the team I stayed back and tried to learn how the team works." In the six to seven months that he was there, the Respondent asserted that while members were "assigned a specific position on the tact plan to do different duties during the tour," these jobs "always changed for the most part."

The Respondent testified that he had no independent recollection of the events of August 3, 2007.

The Respondent stated that if an officer is "involved in stopping someone and arresting them," he is supposed to voucher the property. If the arresting officer is not on the scene when the arrest takes place, "I would assume that the person that stops that individual is solely responsible for securing said property until the supervisor would arrive . . . and then it is up to the supervisor."

On cross-examination, the Respondent testified that a tactical meeting occurs before a buy-and-bust operation to inform the field team of the undercover officers and conditions at the location or in the precinct. He stated that it is general practice for a tac meeting to occur and for a written tac plan to be produced.

The Respondent testified that generally he wrote in his activity log, or memo book, at the beginning of his tour, what his assignment was on a narcotics operation. Because he did not take his memo book with him into the field, he generally would not note there if his team assignment had changed. He added, however, that if "something happens on the field I would note it on my memo book. Once everything is settled I would go back to the car I would make a note of it."

The Respondent described the chase car as being a vehicle that was part of the field team. Its purpose was to assist that field team. In general, the apprehension team, not the chase car, makes the arrests; the chase car was extra personnel to be used if necessary. In his previous assignment to Narcotics Borough Queens, two members were usually assigned to the chase car.

The Respondent agreed that the members on a narcotics operation were assigned as a team "primarily so that if somebody needs back up or requires help somebody on the team is able to do that." He asserted that in the situation described at trial, the vouchering of the bicycle was Fernandez's responsibility until a supervisor said otherwise.

The Respondent's activity log entry was admitted as Respondent's Exhibit A. It read that the Respondent was present for duty at 2100 hours at BSND. The Respondent wrote, "Team 1 w/ Det Stuart Fernandez." At 2300 hours, the Respondent wrote that he was en route, in the vicinity of the 67 and 70 Precincts, regarding buy-and-bust and observation operations. His tour ended at 0733 hours the next day.

Upon questioning by the Court, the Respondent testified that if he had helped handcuff a suspect, or did "something relevant . . . if I took actions if I did something out there I would have it in my memo book, however, "if I didn't interact or did not apprehend anyone, no." The Respondent stated that if two members apprehended a suspect, i.e., "they both chase someone they both fall to the ground with the suspect, the suspect is struggling maybe and they both have to essentially hold down the suspect to put the handcuffs on," the supervisor would make a determination of who should voucher the prisoner's property.

FINDINGS AND ANALYSIS

The Respondent is charged with failure to safeguard a prisoner's property. Gabriel Petrella alleged in the course of a different investigation that when he was arrested for sale of marijuana to an undercover officer, he was riding a bicycle. After he was arrested, the bicycle was not returned to him and he did not know who was responsible for taking it.

The Respondent was working on August 3, 2007, as part of a Brooklyn South Narcotics field team that was conducting buy and bust operations. As the tac plan indicated, and as the Respondent's activity log confirmed, he was assigned to the "chase car" with Fernandez and Stuart. This meant that they were not the primary unit in charge of apprehending drug sellers after a signal from the undercover buying or ghost officers that a sale had been made.

The Official Department Interview of another detective, Manuel Fernandez, was presented as evidence by the Department. Fernandez stated that it was put over point-to-point radio that Petrella had taken off on a bicycle, and Fernandez stopped him "much later" on a bicycle.

Fernandez got out of the car to make the stop. He was the first person to reach Petrella, and grabbed him. There was a brief struggle and Petrella fell off the bicycle. Fernandez handcuffed him, and by this time, the entire field team was present.

The Respondent argued that he was not Petrella's arresting officer and was not ordered by any supervisor to do anything with regard to the bicycle. Nevertheless, Fernandez confirmed that the Respondent was present while Petrella was being handcuffed – along with the rest of the field team. But Fernandez also indicated that when he first grabbed Petrella, the entire team was not present; the prisoner van had not yet arrived:

Q: Okay. And then sometime during the time you grab him on the bicycle and cuff him the P van is now there

A: Yes. It was jumping out when I was picking him up, yeah.

It is true, as Bianco testified, that the ultimate responsibility for vouchering property belongs to the arresting officer. Here, that was Hunter. The designation of Hunter as “arresting officer,” however, does not account for the fact that in an operation like the one here, involving a team of at least seven members – probably more – other members may have a similar responsibility, to at the very least safeguard that property so that it can be vouchered. As Bianco stated, an officer that stops a suspect is responsible “for any property that they come into contact with,” regardless of whether that officer ends up being the arresting officer.

As has often been stated, the Patrol Guide is a *guide* to members of the service as to how they must conduct themselves. It does not cover every possible on-duty or off-duty scenario and cannot be expected to do so. Here, the responsibility for securing the prisoner’s property fell first to Fernandez because he was the officer that seized the prisoner. But he was not alone; the Respondent and Stuart were there as well. It is not surprising that neither Fernandez nor the Respondent could recall from memory who else they were working with. Nevertheless, the tac plan showed that Fernandez, Stuart and the Respondent were in one car, and the Respondent’s activity log also showed them on the same team. The mere possibility that members might be in different places than originally planned does not alter this Court’s reliance on what the documentary evidence demonstrated. The Respondent seemed to indicate that he likely would not have noted any changes in his activity log, but in light of the fact that he wrote down the original positions, the Court fails to understand why he would not note assignment changes.

The Respondent was present when Petrella was first spotted, and when Fernandez got out of the vehicle to arrest him. There was a struggle before Fernandez could handcuff Petrella, but he was able to do the cuffing by himself. By the time “we were on the floor and [Fernandez]

was cuffing him on the floor,” the entire field team was present. Although it is not possible in a strict sense to say what the Respondent saw, he was present while Petrella was spotted on a bicycle after the buy, Fernandez got out of the chase car, tackled Petrella, and briefly struggled with him. As an officer in the same chase car as the officer that apprehended Petrella, the Respondent should have seen that Fernandez was unable to secure the prisoner’s property by himself because he was occupied with subduing and handcuffing Petrella. The Respondent should have stepped in to secure the bicycle, regardless of when the rest of the field team arrived. Accordingly, the Court finds him Guilty.

PENALTY

In order to determine an appropriate penalty, the Respondent’s service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on July 1, 1998. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of failing to safeguard a prisoner’s property. In *Case No. 81233/05*, signed May 1, 2006, the trial commissioner recommended a penalty of 5 vacation days for a police officer who was ordered by the desk sergeant to remove a prisoner’s chain necklace. The officer placed the necklace in an envelope next to the prisoner’s belt and shoelaces outside the holding cell. He told the prisoner to tell the arresting officer about the envelope. The necklace later went missing. The Police Commissioner raised the penalty to 8 vacation days, noting, “All members of the service must be diligent regarding the proper handling of prisoner property. To act otherwise will cause embarrassment to the Department and

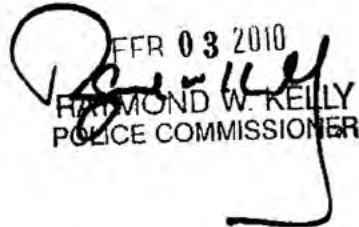
subject the Department to possible liability.” See also *Case No. 83197/07*, signed Oct. 20, 2008 (negotiated penalty recommendation of 10 vacation days; officer made arrest for aggravated unlicensed operation but allowed the prisoner to put his cell phone and wallet containing over \$300 in the vehicle’s glove box instead of vouchering it). Accordingly, the Court recommends that the Respondent forfeit 10 vacation days as a penalty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED



FEB 03 2010
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE EDGAR BAYAS
TAX REGISTRY NO. 921142
DISCIPLINARY CASE NO. 84888/09

In 2005 and 2008, the Respondent received an overall rating of 4.0 “Highly Competent” on his annual performance evaluation. In 2006, he received a rating of 3.5 “Highly Competent/Competent.” He has been awarded one medal for Excellent Police Duty. [REDACTED]

[REDACTED] In February 2008, he was placed on Level-II Discipline Monitoring.

The Respondent has been the subject of one prior disciplinary adjudication. In 2006, he was found guilty after a Department trial of receiving one hour of overtime compensation to which he was not entitled. In addition, he pleaded guilty to failing to safeguard his off-duty firearm, shield, and Department cell phone. For this misconduct, the Respondent forfeited 20 vacation days.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials